

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:) Bankr. No. 97-40952
) Chapter 12
JAMES W. KUSSOW)
Soc. Sec. No. 391-36-2941) DECISION RE: FEE APPLICATION
) FILED BY DEBTOR'S COUNSEL
Debtor.)

The matter before the Court is the Final Fee Application filed by Rollyn H. Samp, counsel for Debtor, and the objection thereto filed by ITML Horticultural Products, Inc. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings of fact and conclusions of law under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Application will be approved with two deductions for certain expenses.

I.

James W. Kussow ("Debtor") filed a Chapter 12 petition in 1997. He obtained confirmation of a plan for debt repayment in mid 1998. The plan provided that priority claim holders and secured claim holders would be paid in accordance with the confirmed plan in the companion case of *In re Gro Joy Plants, Inc.*, Bankr. No. 97-40090. Debtor's confirmed plan also provided that unsecured creditors would receive annual payments of \$200 in 1999 and 2000. The confirmed plan was modified by order entered May 27, 1999. Under the modification, the unsecured creditors of both Gro-Joy and Debtor were to receive the balance of proceeds after the sale of assets, the \$200 payments contemplated in the original plan, and

any disposable income Debtor might have through April 1, 2003. The modification also contemplated paying Debtor's attorney's fees.

Debtor's bankruptcy attorney, Rollyn H. Samp, filed a final fee application on September 17, 2002. He requested compensation for services totaling \$1,802 from August 14, 1997, through October 30, 2000. Attorney Samp also requested reimbursement for expenses totaling \$314.10 and sales tax of \$123.54. The total fees sought was \$2,239.64.

On October 10, 2002, ITML Horticultural Products, Inc., filed an objection to Attorney Samp's fee application. ITML stated it objected to the fee application because it had Debtor's "signed Personal Guarantee on file."

II.

Under § 330 of the Bankruptcy Code, a debtor's attorney is entitled to "reasonable compensation for actual, necessary services" and "reimbursement for actual, necessary expenses." It also provides that:

In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
- (E) whether the compensation is reasonable

based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3). Further,

In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

11 U.S.C. § 330(a)(4)(B). The applicant bears the burden of establishing entitlement to a fee award and documenting the appropriate hours expended. *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991). A case by case, item by item review of the fee application is appropriate. *In re Marolf Dakota Farms Cheese, Inc.*, Bankr. No. 89-50045, slip op. at 6 (Bankr. D.S.D. October 19, 1990)(cites omitted). The "lodestar" method of calculating the fee award is used: the number of hours reasonably expended multiplied by a reasonable hourly rate. *Chamberlain v. Kula (In re Kula)*, 213 B.R. 729, 736-37 (B.A.P. 8th Cir. 1997).

III.

The compensation sought by Attorney Samp for the legal and accounting work performed by his office is reasonable. The application meets the criteria of § 330(a) as well as the requirements of Fed.R.Bankr.P. 2016(a) since the services performed are itemized and adequately described. Accordingly, compensation of \$1,802 and the attendant sales tax on these services will be approved.

The reimbursement for expenses sought by Samp's law firm will also be approved, with applicable sales tax, with two exceptions. The itemization for faxes received or sent is inadequate since the number of pages involved and any long distance calls associated with sending a fax are not set forth. As discussed *In re Citi-Westport Partners*, Bankr. No. 94-40047, slip op. (Bankr. D.S.D. March 6, 1995), and *In re McTighe Industries, Inc.*, Bankr. No. 98-40440, slip op. (Bankr. D.S.D. March 9, 1998), § 330(a)(1)(b) only allows reimbursement of *actual* expenses. Accordingly, the appropriate charge for sending a fax is the cost for the telephone transmission, if any, that is not already included in the attorney's overhead. *Citi-Westport Partners*, slip op. at 2. Local faxes would not incur any additional telephone charge while faxes sent long distance would cost the actual charge of the long distance telephone call. *Id.* There is no additional paper involved that is not included in overhead. *Id.* For receiving a fax, the actual cost in the paper to print the transmission received. *Id.*

The Court does not want to discourage the use of fax machines. They save time and resources and are now a common, integral element in business communication, unlike even a few years ago. Compare *In re CF & I Fabricators Of Utah, Inc.*, 131 B.R. 474, 494 (Bankr. D. Utah 1991). When a fax serves as a substitute for regular mail service, however, it should not be considered arbitrarily a non overhead expense that is billable to the bankruptcy estate. Section 330(a) of the Code states only actual, necessary expenses may be reimbursed. The Code does not contemplate a profit on expenses. *Id.* at 493-94.

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Id. Since the fax charges in Attorney Samp's application were not adequately itemized under the standards discussed above, these charges will be reduced by half.

The other deduction that will be made is \$8.00 for "Secretarial/Administrative Charges[,] Minuteman - transcription" on May 31, 2000. Without a better description, it appears that this entry encompassed only overhead office expenses that are paid through Attorney Samp's hourly rate. Thus, the total deduction in expenses is \$16.00 (\$8.00 for faxes and \$8.00 for secretarial services).

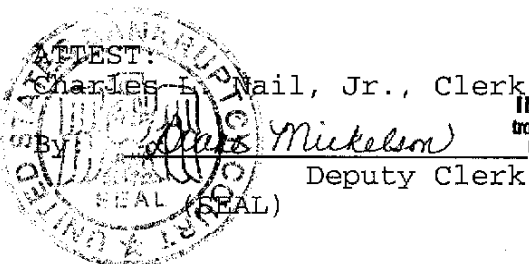
That ITML may hold a personal guarantee from Debtor does not alter the fees that Attorney Samp is permitted to receive under the Bankruptcy Code. The personal guarantee did not create a security interest for ITML in any of Debtor's assets. The personal guarantee also did not raise the priority of ITML's claim under the Bankruptcy Code so that it had to be paid in full ahead of Attorney Samp's fee claim. See 11 U.S.C. §§ 507 and 1222(a)(2). Accordingly, ITML's objection to the fee application is overruled.

An appropriate order will be entered.

So ordered this 5 day of November, 2002.

BY THE COURT:


Irvin M. Hoyt
Bankruptcy Judge



I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

NOV 06 2002

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By: dm

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

NOV 06 2002

Charles L. Nail, Jr., Clerk
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